UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PATRICIA ZEBULSKE,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 04-49-B-W***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the question whether substantial evidence supports the commissioner's determination that the plaintiff was capable of making an adjustment to work existing in significant numbers in the national economy. I recommend that the commissioner's decision be vacated.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had fibromyalgia and an affective mood disorder, impairments that were severe but which did not meet or equal the criteria of any of the

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on October 20, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and (*continued on next page*)

impairments listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the "Listings"), Finding 3, Record at 23; that her statements concerning her impairments and their impact on her ability to work were not entirely credible, Finding 4, *id*.; that she retained the residual functional capacity to lift and carry up to 20 pounds, stand for 45 minutes at a time, for a total of six hours in an eight-hour work day and sit for 60 minutes at a time, for total of six hours in an eight-hour work day, Finding 5, *id*.; that she was unable to perform work requiring: more than occasional incidental contact with the general public, understanding, remembering and carrying out more than simple and occasionally detailed instructions, repetitive work changes, climbing of ladders, ropes, or scaffolds, or repetitive balancing, stooping, kneeling, crouching, crawling or climbing of ramps and stairs, *id*.; that she was capable of frequent interaction with coworkers as long as it was in a work environment of no more than 20 people and of responding appropriately to routine supervision, *id*.; that she had symptoms of occasional mild to moderate confusion and pain but that she retained enough attentiveness and responsiveness to carry out normal work assignments satisfactorily, *id*.; that she was unable to perform her past relevant work, Finding 6, *id*.; that her capacity for the full range of light work was diminished by non-exertional impairments, Finding 7, *id*.; that given her age (47), education (GED), lack of transferable skills and exertional capacity for light work, use of Rule 202.21 of Appendix 2 to Subpart P, 20 C.F.R. Part 404 (the "Grid") as a framework resulted in the conclusion that the plaintiff was capable of making a successful adjustment to other work existing in significant numbers in the national economy, Findings 8-12, *id*. at 23-24; and therefore that the plaintiff had not been under a disability, as that term is defined in the Social Security Act, at any time through the date of the decision, Finding 13, *id*. at 24. The Appeals Council declined to review the decision, *id*. at 5-8, making it the final determination of the

page references to the administrative record.

commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623, (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination made must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential review process. At Step 5, the burden of proof shifts to the commissioner to show that a claimant can perform work other than her past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Discussion

The plaintiff contends that the administrative law judge failed to give good reason for his decision to credit the findings of a reviewing physician employed by the state disability service who reviewed her medical records[2] over the conclusions of her treating physician, Barbara A. Vereault, D.O., including the

[2] The plaintiff spends considerable time and effort, Statement of Errors at 3-4, 5, arguing that the administrative law judge could not rely on the assessment performed by a "single decision maker," who is not a physician, with respect to her residual functional capacity, Record at 180-87. The administrative law judge erroneously refers to this assessment as having been performed by a physician and states that he gave "considerable weight" to the opinions of "the experts at the state Disability Determination Services." Record at 21. So long as the contents of the one of the two state-agency RFC reports that was written by a physician, *id*. at 206-13, provides substantial evidence in support of the administrative
(*continued on next page*)

doctor's conclusion that the plaintiff could not work. Statement of Specific Errors ("Statement of Errors") (Docket No. 7) at 4. She also apparently contends that the administrative law judge erred in rejecting psychological limitations noted by a state-agency reviewer. *Id*. at 5-6. Finally, she contends that the administrative law judge wrongly "create[d] . . . vocational testimony" by reducing the number of available jobs to which the vocational expert testified by 75 per cent. *Id*. at 6-7.[3]

The regulation on which the plaintiff relies provides, in relevant part:

> Regardless of its source, we will evaluate every medical opinion we receive. Unless we give a treating source's opinion controlling weight . . . we consider all of the following factors in deciding the weight we give to any medical opinion.
>
> (1) *Examining relationship*. . . .
>
> (2) *Treatment relationship*. . . . When we do not give the treating source's opinion controlling weight, we apply the factors listed in paragraphs (d)(2)(i) and (d)(2)(ii) of this section, as well as the factors in paragraphs (d)(3) through (d)(6) of this section in determining the weight to give the opinion. We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion.
>
> (i) *Length of the treatment relationship and the frequency of examination*. . . .
>
> (ii) *Nature and extent of the treatment relationship*. . . .
>
> (3) *Supportability*. . . .
>
> (4) *Consistency*. . . .
>
> (5) *Specialization*. . . . .
>
> (6) *Other factors*. . . .

---

law judge's conclusions, his error in referring as well to the report of the non-physician does not require remand.

[3] The plaintiff also contends that the administrative law judge was required to give reasons for giving more weight to the opinion of the state-agency reviewing physician than to that of Geoffrey M. Gratwick, M.D. Statement of Errors at 5. However, there is no indication in the record that Dr. Gratwick saw the plaintiff more than once. Record at 308-10. On that occasion, he did not opine as to any physical limitations imposed on the plaintiff by his diagnosis of "soft tissue rheumatism, FMS." *Id*. at 310. Since Dr. Gratwick was not a treating physician, as counsel for the plaintiff agreed at oral argument, the requirement of 20 C.F.R. § 404.1527(d), on which the plaintiff relies, Statement of Errors at 4, is not applicable.

20 C.F.R. §§ 404.1527(d), 416.927(d). She also relies on the following language from a Social Security Ruling entitled "Giving Controlling Weight to Treating Source Medical Opinions:"

> When the determination or decision:
> is not fully favorable . . .
> the notice of the determination or decision must contain specific reasons for the weight given to the treating source's medical opinion, supported by the evidence in the case record, and must be sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to the treating source's medical opinion and the reasons for that weight.

Social Security Ruling 96-2p, reprinted in *West's Social Security Reporting Service* Rulings (Supp. 2004), at 114-15.

The plaintiff does not contend that Dr. Vereault's opinion should be given controlling weight nor that the administrative law judge was required to consider her opinion that the plaintiff was not "in a position to work." Record at 267.[4] The plaintiff argues, without citation to authority, that the non-examining physician who reviewed her medical records at the state-agency level "does not reconcile the treating physician[']s opinion as he is required to do." Statement of Errors at 5. Assuming *arguendo* both that the reviewing physician was required to do so and that his failure to do so could provide grounds for remand, the report itself makes clear that the reviewing physician did review Dr. Vereault's records. He notes her diagnosis of fibromyalgia, followed by the statement that "[h]owever, at [the consulting psychological examination ordered by the state agency] she admitted to capability for all self care tasks, household tasks including vacuuming [and] cleaning, doing all her own [shopping?], going for walks, knitting." Record at 207. This note sufficiently distinguishes Dr. Vereault's opinion from the reviewing physician's conclusions.

[4] An opinion that a claimant is disabled is an opinion on an issue that is reserved to the commissioner and will not be considered as a medical opinion. 20 C.F.R. §§ 404.1527(e).

The plaintiff next contends that the administrative law judge "gives no reason why he chose the single non-examining physician[']s opinion as being entitled to more weight than that of . . . Dr. Vereault." Statement of Errors at 5. To the contrary, the administrative law judge did address this issue. He stated, *inter alia*:

> Although the claimant has fibromyalgia syndrome, findings on examinations have been minimal, and x-rays have shown only mild hypertrophic changes in the thoracic spine (Exhibits 6F, 8F, 10F, and 11F). Based on his examination of October, 2001, rheumatologist Geoffrey M. Gatwick M.D., questioned whether the claimant also had a somatoform disorder (Exhibit 11F). The claimant has been encouraged to stay as active as possible, and has received only conservative treatment in the form of chiropractic manipulation, which the evidence indicates ahs resulted in improvement of her back pain (Exhibits 6F, and 10F). As of August, 2001, prescribed pain medication included only Doxepin, and an occasional Tylenol III (Exhibit 9F, and 10F). Despite her impairments, the claimant is capable of performing a wide range of activities of daily living, including caring for her personal needs, cooking, shopping, driving, cleaning, washing dishes, and doing laundry (Exhibits 6E, 9E, and Testimony). She is able to socialize with family and friends (Exhibits 6E, 9F, and Testimony). The claimant's hobbies include knitting, crocheting, reading, interactive computer games, and gardening (Exhibits 7E, 9F, 11F, and Testimony). She goes for walks approximately five times a week, and goes to the library (Exhibit 9F, and Testimony). She also goes camping and fishing (Exhibit 6E). . . .
>
> In assessing the claimant's residual functional capacity, the undersigned has given careful consideration to the opinions expressed by the medical sources of record . . . . The undersigned has considered the opinion of the experts at the state Disability Determination Services, who essentially found that the claimant could perform light work. As non-examining physicians, their opinions are not entitled to controlling weight, but must be considered and weighed as those of highly qualified physicians who are experts in the evaluation of the medical issues in disability claims . . . . The undersigned finds these opinions to be well supported and consistent with the record as a whole. Therefore, they have been given considerable weight.

Record at 20-21. This discussion is adequate under the cited regulations and Ruling.

The administrative law judge's treatment of the evidence concerning the plaintiff's affective disorder is more troubling. His hypothetical question to the vocational expert, *id*. at 48-49, was virtually identical to

the findings set forth in his opinion with respect to the plaintiff's physical and mental limitations, *id*. at 23. When the plaintiff's attorney added to the hypothetical question the marked inability to interact appropriately with the general public that was found by the state-agency psychologist, *id*. at 189, the vocational expert testified that the plaintiff would not be able to perform the jobs she had previously identified as being within the terms of the administrative law judge's hypothetical question, *id*. at 49. She testified that no jobs would be available to the plaintiff when the administrative law judge then amended his hypothetical question to include all of the specific limitations found by the state-agency psychologist, *Id*. at 50-51. The administrative law judge then asked the vocational expert a series of questions based on the intelligence scores obtained by the plaintiff in a consultative psychological evaluation ordered by the state agency. *Id.* at 51-53. The vocational expert responded that vocational rehabilitation would be necessary. *Id*. at 51. The administrative law judge followed those questions with questions concerning the availability of jobs in a setting with fewer than 20 co-workers and supervisors and no interaction with the public, *id*. at 52-57, and the vocational expert responded that she did not know how many such jobs existed, although there were job categories within which such jobs likely existed, *id*. at 54-57. The administrative law judge then announced that he would "diminish [the total] number [of such jobs] by 75 per cent" because he "believe[d] that those kinds of jobs in small office setting[s] exist in significant numbers." *Id*. at 57.

There is simply no evidence in this record to support the administrative law judge's conclusion that significant numbers of such jobs exist in the national economy. The vocational expert testified that she could not know how many such jobs existed. Record at 55. The administrative law judge's choice to adopt the testimony while reducing the total number available of each job is completely arbitrary. *See generally Rohan v. Barnhart*, 306 F.Supp.2d 756, 767 (N.D. Ill. 2004) (rejecting administrative law judge's arbitrary selection of onset date). There is no way in which the conclusion that a significant number of jobs

are available in the national economy that the plaintiff is capable of performing, given her mental limitations,[5] can be said to be supported by substantial evidence in this case.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the case remanded for further proceedings consistent with this opinion.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 25th day of October, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

PATRICIA G ZEBULSKE represented by **DAVID A. CHASE**
MACDONALD, CHASE & DUFOUR
700 MOUNT HOPE AVENUE
440 EVERGREEN WOODS
BANGOR, ME 4401
942-5558
Email: eholland@macchasedufour.com

[5] The state-agency psychologist's findings are undisputed in the record.

V.

Defendant

COMMISSIONER OF SOCIAL SECURITY	represented by	**ESKUNDER BOYD** SOCIAL SECURITY ADMINISTRATION OFFICE OF GENERAL COUNSEL, REGION I 625 J.F.K. FEDERAL BUILDING BOSTON, MA 02203 617/565-4277 Email: eskunder.boyd@ssa.gov